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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-500

HENRY Y. DEIN, *Petitioner,*

vs.

UNITED STATES OF AMERICA, CHARLES G. CASTOR, WILLIAM T. ROBINETTE AND JAMES A. JAMES, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Henry Y. Dein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on July 8, 1977.

OPINIONS BELOW.

The opinions of the United States District Court for the Southern District of Indiana and of the United States Court of Appeals for the Seventh Circuit are not yet reported. Copies of these opinions are included as part of the Appendix, *infra* at pages 17a and 26a, respectively.

JURISDICTION.

The judgment of the court of appeals (Appendix, p. 39a) was entered on July 8, 1977. A timely petition for rehearing was filed on July 22, 1977, and denied on August 9, 1977. (Appendix, p. 40a.) Associate Justice John Paul Stevens entered an order on August 26, 1977 extending the time to file a petition for writ of certiorari to and including September 30, 1977. (Appendix, p. 41a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether an indictment charging a scheme or artifice to defraud in violation of 18 U.S.C. § 1341 is sufficient where the alleged scheme or artifice neither sought nor obtained money or property, where no alleged victim could or did suffer pecuniary harm, and where no breach of public or private trust or any fiduciary relationship was involved?

2. Whether the court of appeals employed the proper standard and scope of review in determining the propriety of the district court's dismissal of the indictment?

3. Whether 18 U.S.C. § 1341, as construed and applied to the indictment by the court of appeals, is impermissibly vague and overbroad so as to deny petitioner rights guaranteed him by the First and Fifth Amendments of the United States Constitution?

STATUTE INVOLVED.

This case involves the mail fraud statute, 18 U.S.C. § 1341, which reads as follows:

> "§ 1341. Frauds and swindles
>
> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other articles, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE.

Petitioner Dein and respondents Castor and Robinette are active and highly respected members of the bar in Indianapolis, Indiana. They practice law for a living, and they have specialized, *inter alia,* in assisting clients thread their way through the intricacies of the local and state liquor laws and regulations.

In January 1970, when Indianapolis "went metro", it was expected that, based on increased population,

forty-five new liquor permits would become available. On behalf of approximately a dozen clients, including respondent James, lawyers Dein, Castor, and Robinette filed applications for new permits but were refused by the Indiana Alcoholic Beverage Commission. Suit was then filed in state court to compel the processing of applications for the issuance of additional licenses based upon the increased population figures.

The lawyers prevailed in court and the liquor authorities began processing applications. In recognition of the plaintiff-applicants' initiative, in having the matter clarified in the local court, the liquor authorities adopted an administrative policy of giving preference to applications of plaintiff-applicants in the issuance of permits.

Petitioner Dein and respondents Castor, Robinette, and James were indicted in May 1976 for fourteen violations of the federal mail fraud statute, 18 U.S.C. § 1341, and for one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. (Appendix, pp. 1a-16a.) The defendants were charged with devising a scheme to defraud the Indiana liquor authorities, as well as certain Indianapolis citizens, in connection with the issuance of newly-available liquor permits.

Reduced to its essentials, the indictment charges that in October 1971 and thereafter, the defendants allegedly concealed their "economic interest" in twelve applications for package store permits through the use of "straw men." These "straw men" were awarded permits and—after several transactions intended to further conceal defendants' interest—ultimately transferred the permits to defendant James.

The indictment charges that the alleged fraud was perpetrated by the filing of false or misleading documents with the state and local alcoholic beverage authorities. Those documents were designed to induce those authorities to issue permits and approve transfers to defendant James. For the purpose of executing the scheme, the indictment concludes, defendants allegedly caused the liquor authorities to mail fourteen letters or notices.

The indictment does not charge corruption or bribery of public officials, or that the public has been deprived of the honest and faithful services of any official. Nor does the indictment charge that any fiduciary had used his position to obtain or attempt to obtain any direct pecuniary gain. Instead, the indictment states that the scheme was intended "to obtain from the Alcoholic Beverage Commission a number of the newly available package liquor store permits." (Indictment ¶ 4, Appendix, p. 2a.)

During the oral argument on defendants' motions to dismiss the indictment before U.S. District Court Judge William E. Steckler, the government conceded that there was no Indiana law or administrative policy forbidding one person to hold more than one package permit.[1] The government further conceded that the alleged "straw men" had been plaintiffs in litigation intended to determine the availability of additional permits and to make mandate the processing of permit applications by the Alcoholic Beverage Commission;[2]

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[1] In fact, a number of corporations and persons hold multiple permits or licenses. Currently, the Hook Drug Co. holds 159 licenses for the operation of retail package liquor stores.

[2] *Indiana Alcoholic Beverage Commission* v. *Baker*, 153 Ind. App.

and that the defendant James fully disclosed that he would purchase and operate the package liquor stores whose permits were to be transferred to him.[3]

The district court dismissed the indictment finding it insufficient on its face; that it did not charge a scheme or artifice within the scope of the mail fraud statute, 18 U.S.C. § 1341, and that the mailings alleged in the indictment were too remote from the alleged scheme to support federal criminal jurisdiction.[4]

Relying on decisions of this Court, the district court held that the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or premises" was added to the mail fraud statute in 1909 not to create an additional or separate offense, but to clarify the preceding language, "any scheme or artifice to defraud." Since the package liquor store permits in question are not "money or property", the district court concluded that the scheme charged was not within the scope of 18 U.S.C. § 1341 and that "the acts charged here do 'not come up to the level of criminality.' "

133; 286 N.E. 2d 174 (1972); *State of Indiana ex rel. Miller* v. *Indiana Alcoholic Beverage Commission*, (Cause No. S772-231, Marion Cty. Sup. Ct., August 25, 1972).

[3] The permits subject to the alleged fraud were issued in 1974. To date neither the local board nor state commission has taken any action whatsoever to revoke them. Each of the permits has been reviewed and renewed annually, including at least once since the indictments in this case were handed down.

[4] Though the issue is not raised here, petitioner Dein does not concede that the district court erred in holding that the mailings alleged in the indictment did not have the requisite nexus to the scheme.

The government appealed the trial court's dismissal of the indictment and the court of appeals reversed and remanded for further proceedings. A petition and brief for rehearing with an *in banc* suggestion was timely filed on July 22, 1977. By order of August 9, 1977, rehearing was denied by the circuit court.

REASONS FOR GRANTING THE WRIT.

Introduction

In recent years there have been increasing attempts to extend the federal mail fraud statute to a variety of schemes not traditionally considered within its ambit. In particular, situations involving elected officials and kickbacks, bribery and concealed self-dealing have come into play. Title 18, Section 1341 has been stretched in an effort to attack a wide variety of frauds until more appropriate and more specific criminal legislation is enacted.[5] However, the statute retains clearly defined limits which the government, in this case, has sought to expand by a quantum leap. This expansion of statutory scope, as proposed by the indictment, would ignore fundamental tenets of federal criminal and constitutional law:

> It is elementary that the jurisdiction of federal courts is defined and limited by the Constitution and congressional action; hence, statutes such as section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. *Healy* v. *Ratta,* 292 U.S. 263, 270, 54 S. Ct. 700, 78 L. Ed. 1249 (1934); *Kline* v. *Burke Constr. Co.,* 260 U.S. 226, 233-234, 43 S. Ct. 79, 67 L. Ed. 226 (1922). Moreover, such

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[5] *United States* v. *Maze,* 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting).

> construction is especially appropriate where, as here, the Government urges that we construe a federal criminal statute so that it reaches conduct which the states should appropriately control and which they can control effectively. Indeed as the Supreme Court has emphasized, § 1341 is not designed to reach all frauds, "but only those limited to instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann* v. *United States*, 323 U.S. 88, 95, 65 S. Ct. 148, 151, 89 L. Ed. 88 (1944); see *Parr* v. *United States*, 363 U.S. 370, 80 S. Ct. 1171, 4 L. Ed.2d 1277 (1960).

United States v. *Kelem*, 416 F.2d 346, 347 (9th Cir. 1969).

An Indictment Charging A Scheme or Artifice to Defraud in Violation of 18 U.S.C. § 1341 Is Insufficient Where The Alleged Scheme or Artifice Neither Sought Nor Obtained Money or Property, Where No Alleged Victim Could or Did Suffer Pecuniary Harm, and Where No Breach of Public or Private Trust or Any Fiduciary Relationship Was Involved.

Petitioner Dein's co-defendants are simultaneously seeking review of the Court.[6] Their petition includes a detailed discussion of this "money or property" issue. To avoid needless duplication, that discussion is incorporated here by reference in its entirety. The Court is respectfully urged to refer to the companion petition at pages 8 thru 13.

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[6] A petition for writ of certiorari in No. 77-337 was filed on September 1, 1977 in behalf of Charles G. Castor, William T. Robinette, and James A. James.

The Court of Appeals Employed An Improper Standard and Scope of Review In Determining the Propriety of the District Court's Dismissal of the Indictment.

In this case, the district court granted a motion to dismiss the indictment. Such action is discretionary. *United States* v. *Hedges,* 458 F.2d 188, 191 (10th Cir. 1972); and the *United States* v. *Birrell,* 242 F. Supp. 191, 205 (S.D.N.Y. 1965). The proper standard for the review of an act within the discretion of the district court is whether there has been an abuse of discretion. *United States* v. *Linetsky,* 533 F.2d 192, 203 (5th Cir. 1976), and *Whitfield* v. *United States,* 401 F.2d 480, 482 (9th Cir.), *cert. denied,* 393 U.S. 1026 (1968). Absent a finding of abuse of discretion, acts taken within the discretion of the trial judge will not be disturbed. *Williams* v. *United States,* 402 F.2d 47 (10th Cir. 1967).

District Judge Steckler dismissed the indictment on the grounds that it did not charge a scheme or artifice to defraud within the scope of the mail fraud statute and that the mailings alleged to be in furtherance of the scheme were not sufficiently connected with the scheme to support federal criminal jurisdiction. Upon review, the circuit court panel faulted the approach employed by the district court in testing the sufficiency of the indictment:

> We believe the district court asked the wrong question in considering this aspect of the indictment. The question is not whether the indictment particularly alleges sufficient facts from which a jury could find that the mailings charged were in furtherance of the scheme, but rather whether the Government conceivably could produce evidence at trial showing that the designated mailings were for the purposes of executing the scheme. *United States* v. *Sampson,* 371 U.S. 75, 76 (1962). The

> resolution of the question of whether the mailings alleged were in furtherance of the scheme must await trial . . . .

United States v. *Castor, et al.*, No. 76-2068 at 9 (7th Cir. 1977).

Petitioner suggests that criticism of the trial court is misplaced; it is the appellate decision which suffers analytical shortcomings. Circuit Judge Bauer requires that an indictment "should not be dismissed as insufficient on its face unless there is NO CONCEIVABLE EVIDENCE that the Government could produce . . . ." Id. (Emphasis supplied.) To support reversal of the district court's action, the opinion includes an enumeration—count by count through all fourteen counts of the indictment—of the evidence which "conceivably" could be produced by the government at the time of trial to substantiate its charges.

The court of appeals' test or standard of "no conceivable evidence" is objectionable in several regards. Most notably, such an approach is not in conformity with the accepted rule:

> A motion to dismiss the indictment is not a device for a summary trial of the evidence. It is directed only to the question of the validity of the indictment on its face, and its sole function is to test the sufficiency of the indictment to charge an offense, *United States* v. *Sampson*, 371 U.S. 75, 83 S. Ct. 173, 9 L. Ed.2d 136 (1962). The sufficiency of the indictment must be determined from the words of the indictment and the Court is not free to consider evidence not appearing on the face of the indictment . . . .

United States v. *Winer*, 323 F. Supp. 604, 605 (E.D. Pa. 1971). *See also, United States* v. *Luros*, 243 F.

Supp. 160, 165 (N.D. Iowa 1965), *Luros* v. *Hanson*, 382 U.S. 956 (1965). On a motion to dismiss [the court] is limited to the face of the indictment . . . ." *United States* v. *Raff*, 161 F. Supp. 276, 282 (M.D. Pa. 1958). It has also been stated that in testing the sufficiency of an indictment, projections as to what the evidence will show may not be considered. *United States* v. *Black*, 291 F. Supp. 262, 264 (S.D.N.Y. 1968); and *United States* v. *Montana State Food Distributors Association, Inc.*, 271 F. Supp. 403, 404-405 (D. Mont. 1967).

The operational result of applying the Seventh Circuit's "any conceivable evidence" test is that an indictment can never be dismissed; the government will always have a "conceivable" evidentiary basis for supporting an indictment. The efficacy of a motion to dismiss in federal practice would be totally emasculated. As authority for this unprecedented approach, the court of appeals mistakenly relies upon *United States* v. *Sampson*, 371 U.S. 75 (1962).

In *Sampson*, the defendants were indicted on charges that they had used the mails "for the purpose of executing" a fraudulent scheme in violation of 18 U.S.C. § 1341. There were related charges of conspiracy as well. The district court dismissed thirty-four of the counts because of inadequate factual allegations on the face of the indictment. On appeal, this Court stated the issue for review:

> The only question we must decide with reference to the 34 substantive counts is whether the allegations in the indictment were sufficient to permit a jury to find that the mails were used 'for the purpose of executing' the fraudulent scheme. Whether the indictment sufficiently charges that the mails were so used depends upon its allegations.

371 U.S. at 76.

The court of appeals, in the instant case, accused the district court of asking the wrong question in considering the indictment. Yet, the question asked by Judge Steckler—whether the indictment alleges sufficient facts from which a jury could find that the mailings charged were in furtherance of the scheme—was the precise question posed by this Court in *Sampson*. *Sampson* stands for the proposition that whether the indictment sufficiently charges use of the mails in furtherance of a scheme depends upon its facial allegations. The district court nowhere departed from this formulation.

The Court in *Sampson* found that the charges in the indictment, if supported by evidence, could be found by a jury to be a mail fraud offense. The court of appeals in this case found that the government could conceivably produce evidence at trial to show that the designated mailings were for the purpose of executing the scheme. In *Sampson,* the focus of the inquiry was upon the indictment itself. In this case, the court of appeals examined the indictment and imaginary evidence. The appellate court projected what evidence the government might produce to support the charges and incorporated its projection as part of the indictment for the purpose of reviewing the dismissal. This approach, under *Sampson,* was clearly incorrect.

Even the most deferential authority to the court of appeals' position does not, on close analysis, support the conclusion that the district court was in error in dismissing the indictment with regard to the mailings. *United States* v. *Feinberg* recognizes that when it appears from the face of the indictment that the mailings charged cannot be in furtherance of the scheme to defraud, the defendant is entitled to dismissal as a matter of law. *United States* v. *Feinberg,* 50 F. Supp. 976, 977

(E.D. N.Y. 1973), aff'd, 140 F.2d 592 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944). In a similar vein is *United States* v. *Crummer*, 151 F.2d 958 (10th Cir. 1945).

The court of appeals has utilized an incorrect standard for assessing the actions of the district court. In the process it disregarded the applicable standard of review. As the court of appeals did not find an abuse of discretion, the decision of the district court regarding the dismissal of the indictment must stand. *Williams* v. *United States*, 402 F.2d 47 (10th Cir. 1967).

The Court Of Appeals Construction Of 18 U.S.C. § 1341 As Applied To The Indictment Is Impermissibly Vague And Overbroad So As To Deny Petitioner Rights Guaranteed Him By The First And Fifth Amendments Of The United States Constitution.

> Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids.
>
> * * * *
>
> The fundamental principle that "the required criminal law must have exercised when the conduct in issue occurred," Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. Id., at 61.

Bouie v. *Columbia*, 378 U.S. 347, 353-354 (1964).

The court of appeals' construction of 18 U.S.C. § 1341 is impermissibly vague as applied to petitioner Dein.

As construed and retroactively applied, the statute failed to provide him fair notice of criminal activity. Prior to the affirmance of the indictment by the circuit court, the petitioner could discern particular uses of the mails which were prohibited and those uses which were not. Unforeseeably, the court of appeals expanded the reach of the mail fraud statute to encompass formerly innocent activities. This judicial action constitutes a deprivation of due process. In support of this contention, several representative cases are discussed.

In *Pierce* v. *United States,* 314 U.S. 306 (1941), the defendant had been convicted under an indictment charging violation of a federal statute prohibiting the impersonation of a federal employee. There was proof offered at trial that Pierce had held himself out as a representative of the Tennessee Valley Authority.

The district court rejected a requested jury instruction noting that the T.V.A., although a governmental instrumentality, was a corporate entity—as such, an attempt to impersonate a T.V.A. employee was beyond the scope of the statute. This Court held that refusal to so instruct the jury was material error:

> [J]udicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. . . . While the act should be interpreted 'so as . . . to give full effect to its plain terms' . . . we should not depart from its words and context. . . .

314 U.S. at 311-12. See also, *United States* v. *Harriss,* 347 U.S. 612, 617 (1954).

In *Rabe* v. *Washington,* 405 U.S. 313 (1972), the petitioner was arrested for violation of the Washington

State's obscenity statute. He had exhibited an allegedly obscene film at his drive-in threatre. The Supreme Court of Washington did not find the displayed film obscene when measured by obscenity tests derived from Supreme Court decisions. Nevertheless, the Washington court subjected the film to an additional obscenity hurdle: the make-up of the viewing audience. Thus, the conviction was upheld on the theory that in the context of its exhibition, the film was obscene.

The conviction was reversed on the ground that the statute under which the petitioner had been convicted was unconstitutionally vague as construed.

> To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. The statute under which petitioner was prosecuted, however, made no mention that the "context" or location of the exhibition was an element of the offense somehow modifying the word "obscene." Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating.

Id. at 315-16.

The appellants in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964)—two black college students—staged a "sit-in" demonstration in a drug store. After they were seated, an employee of the store put up a chain with a "no trespassing" sign attached. The students were convicted under a South Carolina criminal trespass statute which prohibited entry upon another's premises after notice had been given prohibiting such entry. The state Supreme Court affirmed the convictions by relying upon earlier decisions which had construed the statute as also prohibiting the act of remain-

ing on the premises of another after receiving notice to leave.

The Court reversed the demonstrators' convictions finding the South Carolina Court's construction of the criminal trespass statute violative of due process. It is noted that in the typical case uncertainty as to a statue's prohibition results from vague or overbroad language in the statute itself. In *Bouie,* however, the statute is narrowly drawn to prevent "entry upon the lands of another." Typical vagueness resulting from legislative imprecision and vagueness resulting from judicial construction are distinguished—the latter representing a potentially greater due process deprivation in the Court's view.

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.
>
> * * * *
>
> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.

378 U.S. at 351-54.

Most recently, the Court in *Marks* v. *United States,* —— U.S. ——, 97 S Ct. 990 (1977), decided that a

defendant could not be tried on a federal obscenity charge under the standards developed in *Miller* v. *California*, 413 U.S. 15 (1973), when, at the time the offense had been committed, the standard from *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), would have been controlling. Relying on *Bouie*, in reaching this result, Mr. Justice Powell affirmed that the due process clause prohibits retroactive application of an unforeseeable judicial enlargement of a criminal statute. 97 S. Ct. at 993. The holding in *Rabe* was repeated with approval:

> [W]e reversed a conviction under a state obscenity law because it rested on an unforeseeable judicial construction of the statute. We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied. Id. See also *Douglas* v. *Buder*, 412 U.S. 430, 432 (1973).

The vagueness of the court of appeals' decision is a due process violation. It is petitioner Dein's position that this objection is a fatal blow to the appellate construction of the mail fraud statute in this case. However, brief mention will be made of an additional constitutional shortcoming.

Vagueness is a due process vice which can be brought into play with regard to any criminal statute.[7] When applicable to areas respecting expression, as in the instant case, there is additional concern that protected conduct will be deterred out of fear that the statute is capable of application to it. Thus, petitioner's vagueness challenge is coupled with the overbreadth doctrine which focuses on the need for precision in drafting or

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[7] E.g., *Lanzetta* v. *New Jersey*, 306, U.S. 451 (1939); *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926).

interpreting a statute affecting First Amendment rights. *NAACP* v. *Button;* 371 U.S. 415 (1963).

An overbroad statute which sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid; as for an overbroad judicial construction of a statute, the Court should void its application to protected conduct. *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *Gooding* v. *Wilson,* 405 U.S. 518 (1972).

With the demise of the "money or property" requirement, discussed earlier in this petition, the potential sweep of the mail fraud statute is as large as the imagination. First Amendment-protected activities are now vulnerable to the criminal sanctions of 18 U.S.C. § 1341. On behalf of himself and other persons whose expression is constitutionally protected, petitioner Dein puts forward this challenge. *Gooding* v. *Wilson, supra; Lewis* v. *New Orleans,* 415 U.S. 130, 133-34 (1974).

CONCLUSION.

The decision of the court of appeals represents an unprecedented extension in the scope of the mail fraud statute. For the first time, it has been held that the object of a scheme or artifice is within the ambit of 18 U.S.C. § 1341 despite the fact that the scheme neither sought nor obtained money or property, no alleged victim could or did suffer pecuniary harm, and no breach of public or private trust or fiduciary relationship was involved. To reach the conclusion that the district court had mistakenly dismissed the indictment, the appellate court employed a wholly inappropriate standard of review for its inquiry. In sum, the circuit court's broadened construction and manner of review are in conflict

with applicable decisions of this Court and raise serious constitutional questions of vagueness and overbreadth. For all of these reasons, petitioner Dein prays that a writ of certiorari be issued.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

UNITED STATES OF AMERICA, *vs.* CHARLES G. CASTOR, HENRY Y. DEIN WILLIAM T. ROBINETTE AND JAMES A. JAMES.	No. 76 79 CR Vio.: Title 18, United States Code, Sections 1341, 371 and 2

The December 1974 Grand Jury charges:

1. During the time period covered by this indictment, the Indiana Alcoholic Beverage Commission was composed of four (4) commissioners appointed by the Governor of Indiana. This commission was responsible for regulating various aspects of the liquor business within the State of Indiana and was vested with the discretionary authority to issue, deny, suspend, revoke or to deny renewal of all liquor permits authorized by Title 7 of Burns Indiana Statutes. All applications for new permits or for changes in ownership or location were filed with the Alcoholic Beverage Commission and sent by that commission to the appropriate local board for investigation.

2. During the time period covered by this indictment, the Marion County Local Board was composed of four members and was charged with investigating the fitness of those persons applying for liquor permits within Marion County, Indiana and the propriety of issuing the requested permit to the applicant at the named premises. After conducting its investigation concerning these matters, the Marion County Local Board would forward its recommendation to the Alcoholic Beverage Commission, and that commission would grant or refuse the application accordingly, as it deemed the public interest would best be served.

3. During 1972, forty-five (45) additional package liquor store permits became available in Indianapolis, Indiana. During late 1971 and 1972, approximately one hundred and twenty (120) applications were filed with the Alcoholic Beverage Commission by persons or businesses seeking to obtain one or more of the newly available forty-five permits.

4. Beginning in or about October, 1971, and continuing thereafter through the date of the return of this indictment, in the Southern District of Indiana and elsewhere, Charles G. Castor, Henry Y. Dein, William T. Robinette and James A. James, defendants herein, devised and intended to devise a scheme and artifice to defraud the Indiana Alcoholic Beverage Commission, the Marion County Local Board, and those persons, unassociated with the scheme, who applied for the newly available liquor permits, and to obtain from the Alcoholic Beverage Commission a number of the newly available package liquor store permits by means of false and fraudulent pretenses, representations and promises, the defendants well knowing that the pretenses, representations and promises would be and were false when made, and which scheme and artifice to defraud was, in substance, as follows:

A. It was a part of the scheme and artifice to defraud that the defendants, in order to gain control of a group of the new package liquor store permits, and in order to conceal the defendants' economic interest in the applications from the Alcoholic Beverage Commission, the Marion County Local Board and the applicants unassociated with the scheme, would and did, by means of documents containing false and fraudulent pretenses, representations and promises, induce the Marion County Local Board and the Alcoholic Beverage Commission to issue package liquor store permits to persons who did not intend to operate package liquor stores; and, upon the issuance of the licenses, they would and did cause such persons to transfer the licenses to persons and entities of the defendants' choosing. In order to accomplish this object, the following actions were taken:

(1) The defendants caused the following persons: Peter Gordon Dandridge, Howard Kopp, Patricia McQueen, Lawrence Weaver, Charles Pechette, David Neal Lasiter, Terry O. DeMilt, George Rowlas, Margaurite Austin, R. Michael Kelley, Jean Smith and R. Travis Miller, to sign applications requesting the issuance of package liquor store permits to the named applicants.

(2) The defendants caused the above-mentioned applications and other documents required by the Alcoholic Beverage Commission to be filed with the Alcoholic Beverage Commission. As the defendants then and there well knew and intended, these applications and other documents, representations and promises:

(a) That the named applicant intended to run and manage a package liquor store at the named premises.

(b) That the permit which the applicant sought would be for his/her sole private use.

(c) That no other person, company or entity of any kind would have any control or interest, directly or indirectly in the package liquor store business which was to be operated.

B. It was a further part of the scheme and artifice to defraud that the defendant Charles Castor would and did enter into an agreement with John Dillon and Donald Hardamon whereby it was agreed that a permit which previously had been applied for by Donald Hardamon on his own behalf, once issued to him, would be held by him for later use by Charles Castor and the other defendants. The application and other documents filed by Hardamon were, at the time such application was considered by the Marion County Local Board and the Alcoholic Beverage Commission, false in the same respects as alleged in paragraphs 4.A(2)(a)-4.A(2)(c).

C. It was a further part of the scheme and artifice to defraud that the defendants, while concealing their own economic inter-

est in such permits, would and did, by the knowing use of applications and related documents containing false and fraudulent pretenses, representations and promises, induce the Marion County Local Board and the Alcoholic Beverage Commission to approve of changes in the locations of such permits to locations preferred by the defendants. In order to accomplish this object the defendants took the following actions:

(1) They caused documents to be filed with the Alcoholic Beverage Commission which represented that the following persons were applying for changes in the location of the permits which previously had been issued to them: John Daugherty, Patricia McQueen, Lawrence Weaver, David Lasiter, Terry O. DeMilt, George Rowlas, Margaurite Austin, R. Michael Kelley and Jean Smith. As the defendants then and there well knew, such documents contained the following false and fraudulent pretenses, representations and promises:

(a) That the above named persons intended to run and manage a package liquor store at the named premises.

(b) That the above named persons had actually and legally entered into a leasehold agreement for the named premises.

(2) They prepared or caused to be prepared leases which purported to represent agreements between the above named persons as lessees and the named lessors, to rent the named premises, when, in fact, such persons had not entered into valid lease arrangements.

D. It was a further part of the scheme and artifice to defraud that, after the Alcoholic Beverage Commission had issued package liquor store permits to those persons named in paragraph 4.A(1), above, the defendants, for the purpose of concealing their own economic interest in the permits and in order to facilitate the further objectives of the scheme, would and

did by means of documents containing false and fraudulent pretenses, representations and promises, induce the Marion County Local Board and the Alcoholic Beverage Commission to transfer the ownership of eleven (11) of those permits to corporations which were under the control of the defendants. In order to accomplish these objectives the defendants took the following actions:

(1) They caused the formation of eleven separate corporations, bearing the following names:

96th and Keystone Corp.
South Street and Virginia Corp.
Kentucky & Rybolt Corp.
Stop 11 & Madison Corp.
West 10th Corp.
10th and Mitthoeffer Corp.
71st & Indiana 37 Corp.
62nd & Allisonville Corp.
21st & Franklin Corp.
86th & Ditch Corp.
56th & Georgetown Corp.;

and they caused to be named as the president and director of each of those corporations the original applicants or their immediate transferees. The persons so named, except for the person named as president of the 56th and Georgetown Corp., had no real interest in the corporations and acted solely in the interest of and at the direction of the defendants.

(2) By means of applications and other related documents filed with the Alcoholic Beverage Commission, which applications and related documents contained false and fraudulent pretenses, representations and promises, they induced the Alcoholic Beverage Commission and the Marion County Local Board to approve of the transfer to an intermediary and/or to the above named corporations of those permits which had previously been issued to the following persons: Peter Gordon Dandridge, Howard

Kopp, Patricia McQueen, Lawrence Weaver, Charles Pechette, David Neal Lasiter, Terry O. DeMilt, George Rowlas, Margaurite Austin, R. Michael Kelley and Jean Smith. As the defendants then and there well knew and intended, the above mentioned applications and related documents contained the following false and fraudulent pretenses, representations and promises:

(a) That John Daugherty had purchased a permit and other property from Peter Gordon Dandridge.

(b) That the South Street and Virginia Corporation, Joseph Krauter, President, had purchased a permit and other property from Howard Kopp.

(c) That the 62nd & Allisonville Corporation, R. Travis Miller, President, had purchased a permit and other property from Margaurite Austin.

(d) That the Stop 11 and Madison Corporation had purchased a permit and other property from Lawrence Weaver.

(e) That the West 10th Corporation had purchased a permit and other property from David Neal Lasiter.

(f) That the 10th and Mitthoeffer Corporation had purchased a permit and other property from Terry O. DeMilt.

(g) That the 71st & Indiana 37 Corporation had purchased a permit and other property from George Rowlas.

(h) That the 21st & Franklin Corporation had purchased a permit and other property from R. Michael Kelley.

(i) That the 86th & Ditch Corporation had purchased a permit and other property from Jean Smith.

(j) That the following named persons had paid $1000 to the treasurer of the following corporations for stock issued to those persons:

John Daugherty—96th & Keystone Corp.
Joseph Krauter—South Street & Virginia Corp.
Patricia McQueen—Kentucky & Rybolt Corp.
Lawrence Weaver—Stop 11 & Madison Corp.
David Neal Lasiter—West 10th Corp.
Terry O. DeMilt—71st & Indiana 37 Corp.
R. Travis Miller—62nd & Allisonville Corp.
R. Michael Kelley—21st & Franklin Corp.
Jean Smith—86th & Ditch Corp.

(k) That no person, company or entity of any kind other than the incorporators and shareholders would have any interest, directly or indirectly, in the proposed package liquor store business.

E. It was a further part of the scheme and artifice to defraud that, after the ownership of ten (10) of the permits had been transferred to the corporations named in paragraph 4.D.(1) above, the defendants would and did cause to be filed, with the Alcoholic Beverage Commission, applications for major stock transfers, requesting that the stock of each of those corporations be transferred to the defendant James A. James.

F. It was a further part of the scheme and artifice to defraud that the defendants, by causing to be filed the applications referred to in paragraph E above, would and did represent that the purchases of the stock issues by James A. James were "arms length" purchases and that they would and did thereby conceal the existence of the scheme and artifice to defraud and induce the Marion County Local Board and the Alcoholic Beverage Commission to transfer the legal ownership of the permits to defendant James A. James.

5. That on or about September 8, 1972, in the Southern District of Indiana, the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter a post card from the Indiana Alcoholic Bever-

age Commission, Indianapolis, Indiana, addressed to George Rowlas, 5839 North Washington Blvd., Indianapolis, Indiana, containing the date of a proposed hearing to be held before the Marion County Local Board, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count II

1. That Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about December 6, 1972, in the Southern District of Indiana, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to George Rowlas, 5839 North Washington, Blvd., Indianapolis, Indiana, containing notification of the fact that the Indiana Alcoholic Beverage Commission had voted to issue a permit to Mr. Rowlas on November 20, 1972, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count III

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about December 6, 1972, in the Southern District of Indiana, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission,

Indianapolis, Indiana, addressed to Mrs. Jean Smith, 711 Terrace Avenue, Indianapolis, Indiana, containing notification of the fact that the Indiana Alcoholic Beverage Commission had voted to issue a permit to Mrs. Smith on November 20, 1972, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count IV

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about December 6, 1972, in the Southern District of Indiana, the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to Terry O. DeMilt, 5932 Winthrop Avenue, Indianapolis, Indiana, containing notification of the fact that the Indiana Alcoholic Beverage Commission had voted to issue a permit to Mr. DeMilt on November 20, 1972, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count V

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about December 6, 1972, in the Southern District of Indiana, the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for

mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to Lawrence E. Weaver, 2639 N. Cumberland Road, Indianapolis, Indiana, containing notification of the fact that the Indiana Alcoholic Beverage Commission had voted to issue a permit to Mr. Weaver on November 20, 1972, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count VI

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about December 6, 1972, in the Southern District of Indiana, the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to Patricia McQueen, 3244 Patton Drive, Indianapolis, Indiana, containing notification of the fact that the Indiana Alcoholic Beverage Commission had voted to issue a permit to Mrs. McQueen on November 20, 1972, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Section 1341.

Count VII

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment and further charges:

2. On or about September 7, 1972, in the Southern District of Indiana, the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to

do, did knowingly cause to be delivered by the Postal Service of the United States, according to directions thereon, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to F. Pen Cosby, 735 Bankers Trust Building, Indianapolis, Indiana, containing a list of the identities of those persons whose applications were to be processed by the Alcoholic Beverage Commission and the Marion County Local Board, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count VIII

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment and further charges:

2. On or about December 8, 1972, in the Southern District of Indiana, the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did knowingly cause to be delivered by the Postal Service of the United States, according to directions thereon, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to F. Pen Cosby, 735 Bankers Trust Building, Indianapolis, Indiana, containing a statement of the identities of those persons to whom the Alcoholic Beverage Commission had issued package liquor store permits, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count IX

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about March 8, 1973, in the Southern District of Indiana, the defendants, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to George Rowlas, 5839 North Washington Blvd., Indianapolis, Indiana, containing a statement that Rowlas' application had not been completed because of certain missing items, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count X

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment and further charges:

2. On or about June 7, 1973, in the Southern District of Indiana, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to Joseph Krauter, Jr., 4444 Sharon Lane, Indianapolis, Indiana, containing a statement that the application of the South Street and Virginia Corporation had not been completed because of certain missing items, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count XI

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about June 7, 1973, in the Southern District of Indiana, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to R. Travis Miller, 549 East 58th Street, Indianapolis, Indiana, containing a statement that the application of the 62nd and Allisonville Corporation had not been completed because of certain missing items, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count XII

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about September 18, 1972, in the Southern District of Indiana, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to Mr. James Griffin, 2455 Martindale, Indianapolis, Indiana, containing a letter from Mark Y. Brown, Executive Secretary of the Alcoholic Beverage Commission, to James Griffin concerning Mr. Griffin's intention to lease certain property to Peter Gordon Dandridge, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count XIII

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count I of this indictment, and further charges:

2. On or about March 7, 1973, in the Southern District of Indiana, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to David N. Lasiter, 7610 Singleton Drive, Indianapolis, Indiana, containing a statement that Lasiter's application had not been completed because of certain missing items, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count XIV

1. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 4 of Count 1 of this indictment, and further charges:

2. On or about October 17, 1973, in the Southern District of Indiana, the defendants for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting so to do, did cause to be placed in an authorized depository for mail matter, a letter from the Alcoholic Beverage Commission, Indianapolis, Indiana, addressed to Charles Pechette, 8949 Wickham Road, Indianapolis, Indiana, containing a statement that Pechette's application had not been completed because of certain missing items, to be sent and delivered by the Postal Service of the United States.

In violation of Title 18, United States Code, Sections 1341 and 2.

Count XV

1. From in or about October, 1971, and continuing thereafter through the date of the return of this indictment, in the Southern District of Indiana and elsewhere, Charles G. Castor, Henry Y. Dein, William Theodore Robinette, and James A. James, defendants herein, did knowingly and wilfully combine,

conspire and confederate and agree together and with each other and with divers other persons whose names are unknown to the Grand Jury, to commit an offense against the United States, that is, Section 1341 of Title 18, United States Code, to knowingly and wilfully cause the United States mails to be used in furtherance of a scheme and artifice to defraud the Indiana Alcoholic Beverage Commission, the Marion County, Indiana Local Board and certain persons who applied for new package liquor store permits in Marion County, Indiana, during 1971 and 1972.

2. This scheme and artifice is fully described in paragraphs 1 through 4 of Count I of this indictment and is incorporated herein by reference as if set out in full; the objects of the conspiracy being violations of Title 18, United States Code, Section 1341.

3. In furtherance of the conspiracy and in order to effect the objects thereof, the defendants did and caused to be done the acts set forth in Counts I-XIV of this indictment on the dates and at the places and in the manner set forth, all of which are alleged herein as separate overt acts.

4. In addition to the foregoing, in furtherance of the conspiracy and in order to effect the objects thereof, the defendants committed the following additional overt acts:

1. In or about the second week of October, 1972, the defendant Charles G. Castor had a telephonic conversation with John J. Dillon in which it was agreed that a package liquor store permit for which Donald Hardamon had applied would, once issued, be held by Hardamon for the benefit of Castor and others.

2. On or about January 10, 1973, defendant William Theodore Robinette gave a check drawn on the Bulen and Castor office account in the amount of $455 to Donald Hardamon, as reimbursement for money expended by Hardamon in applying to the Alcoholic Beverage Commission for a package liquor store permit.

3. In or about December, 1972, defendants Charles G. Castor and James A. James had a conversation in Indianap-

olis, Indiana, at The Indiana National Bank with Lawrence A. O'Connor, Jr., Harold Eugene Moon, and William F. Fox, wherein Castor and James sought to obtain financing for the operation of ten (10) package liquor stores in Indianapolis, Indiana.

4. In or about February, 1972, defendant William Theodore Robinette had a conversation with F. Pen Cosby during which Robinette retained Cosby to represent a number of persons who were applying for package liquor store permits in Marion County, Indiana.

5. On or about September 20, 1972, William Theodore Robinette furnished a check to F. Pen Cosby in the amount of $455, drawn on the Bulen and Castor office account, in payment for the application fee of Peter Gordon Dandridge.

6. In or about May, 1973, defendant Henry Y. Dein telephonically contacted Joseph Krauter, Jr. and requested that Krauter assist him in transferring a package liquor store permit.

7. In or about January, 1973, defendant Henry Y. Dein caused John David Daugherty to sign documents relating to the transfer of a package liquor store permit from Peter Gordon Dandridge to Daugherty.

8. In or about November, 1971, defendant James A. James had a conversation with Jean Smith and George Rowlas during which James asked Smith and Rowlas to apply for package liquor store permits, with the understanding that the permits would be for James' use.

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL

/s/ LAWRENCE WAYNE CRISPEN

Foreman

/s/ JAMES B. YOUNG

United States Attorney

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division.

UNITED STATES OF AMERICA, *vs.* CHARLES G. CASTOR, HENRY Y. DEIN, WILLIAM T. ROBINETTE, JAMES A. JAMES.	No. IP 76-79-CR.

MEMORANDUM OF DECISION

This matter came before the Court on motions by the defendants, Charles G. Castor, Henry Y. Dein, William T. Robinette, and James A. James, to dismiss the fifteen-count indictment returned against them on May 27, 1976. The indictment contains fourteen counts charging substantive violations of the Mail Fraud Act, 18 U. S. C. § 1341,[1] and one count charging the defendants with conspiracy to violate the Mail Fraud Act, 18 U. S. C. § 371.

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1. "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell. dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depositor for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

In essence, the indictment charges that the defendants[2] embarked upon a scheme to obtain a number of newly available package liquor permits under false or fraudulent pretenses. The defendants are charged with having caused certain persons to file applications and other documents with the Indiana Alcoholic Beverage Commission (ABC) and the Marion County Local Board (MCLB).[3] The indictment names twelve persons whom the defendants allegedly caused to sign and file with the ABC applications for permits as well as other documents which contained false and fraudulent pretenses, representations, and promises.

Liquor permits were subsequently issued to the above-mentioned twelve persons. The indictment charges that the defendants had economic interests in the twelve permits and that after the issuance of the permits the defendants caused certain papers to be filed with the ABC for the purpose of effecting changes of location as to nine of the permits. It is alleged that the transfer papers contained false and fraudulent representations and promises. The indictment goes on to allege that the defendants, using fraudulent methods and concealing their alleged economic interests in the liquor permits, induced the ABC to approve transfers of ownership of eleven of the twelve permits to corporations under the control of the defendants.

The indictment then alleges that after ownership of the permits had been transferred to the corporations the defendants sought and received ABC approval of a transfer of the stock of the corporations to the defendant James.

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2. Defendants Castor, Dein, and Robinette each are members of the same Indianapolis Law firm. Defendant James was a client of said firm.

3. The Indiana Alcoholic Beverage Commission regulates various aspects of the liquor business in Indiana and can issue, deny, suspend, revoke, renew, or deny renewal of all liquor permits in the state. The Marion County Local Board is charged with the responsibility of determining the fitness of Marion County applicants and recommending a specific disposition with respect to each application.

The counts charging violations of the Mail Fraud Act, Counts I-XIV, set forth fourteen separate mailings which allegedly were in furtherance of the alleged scheme outlined above. Each of the fourteen uses of the mails charged involves a letter from the ABC addressed to a person other than one of the defendants. Count I involves a letter to one George Rowlas giving him notice of a hearing on his application for a liquor permit. Count XII revolves around a letter to James Griffin concerning his intention to lease certain property to Peter G. Dandridge, one of the applicants for a new package liquor store permit. No other reference is made to Griffin in Count XII nor does Count XII make any reference to any connection between the intention to lease property and Dandridge's application for a liquor permit.

The mailings alleged in Counts VII and VIII are letters from the ABC to F. Pen Cosby. One of the letters contained a list of the applicants for the newly available liquor permits, while the other contained a list of the successful applicants.

Counts IX-XI and XIII-XIV concern mailings to applicants for permits which noted that their applications were incomplete. These notices were all mailed on or subsequent to March 7, 1973. The ABC voted to issue the permits here in question on November 20, 1972.

The final category of mailings involves notices sent out by the ABC on December 6, 1972, to five of the applicants notifying them that the Commission had acted favorably on their applications for package liquor permits. These mailings are charged in Counts II-VI.

I. *The Mailings.*

The United States Court of Appeals for this Circuit in *United States* v. *Staszcuk*, 502 F. 2d 875 (7th Cir. 1974), held that,

> "To support federal criminal jurisdiction, the mailing must be, in the words of the statute, 'for the purpose of

> executing such scheme or artifice.' The connection between the fraud and the use of the mails 'must be real and proximate, not merely abstract or remote.' " 502 F. 2d at 880, quoting from *United States* v. *Brickey*, 296 F. Supp. 742, 748 (E. D. Ark. 1969).

See also, United States v. *Maze*, 414 U. S. 395 (1974), and *Ohrynowicz* v. *United States*, Cause No. 76-1247 (7th Cir. October 12, 1976).

Subsequent to this Court's announcement of its decision at the October 1, 1976, oral argument, the Court of Appeals handed down *Ohrynowicz* v. *United States, supra. Ohrynowicz* arose from a "check kiting" scheme in which the defendants conspired to defraud banks in which checking accounts were opened by them under false names and addresses. The court below granted Ohrynowicz's 28 U. S. C. § 2255 motion as to several of the counts, basing its decision on *Maze, supra.* The district court, however, distinguished the mailed orders for personalized checks, holding that they occurred both prior to the completion of the scheme and " 'were in pursuance of that scheme.' " Although appellant Ohrynowicz argued that the personalized checks were not used in the scheme and would have hindered rather than furthered the scheme, the Court of Appeals affirmed the district court's decision. However, the Seventh Circuit's decision was based on the fact that there was "enough evidence to support an inference that the ordering of personalized checks was a normal part of the transaction which resulted from the opening of an account . . . ." and that "[a] trial judge's findings of fact ordinarily will not be disturbed unless they are without support in the record." In the instant case the government in its brief in opposition to the motions to dismiss and at oral argument on said motions asserted that the indictment is sufficient since it alleges that each mailing was "for the purpose of executing such scheme or artifice or attempting so to do." However, inasmuch as the mailings alleged in the indictment are facially insufficient, as set forth below, the indictment must be dismissed.

Unlike *Ohrynowicz* none of the mailings alleged in the indictment were even arguably necessary or in furtherance of the alleged scheme or artifice. The letters notifying applicants that permits had been awarded to them cannot be said to be necessary for the success of the alleged scheme as the permits had been previously granted on November 20, 1972. Whether or not notification came by mail, the permits were granted and the mailings could not be shown to be remotely connected to the transfer of the permits to defendant James. Likewise, the letters from the Alcoholic Beverage Commission to applicants stating that their applications were not completed because of the absence of certain items is not sufficiently connected with the offenses charged within the indictment. For the same reason the letters from the Alcoholic Beverage Commission to F. Pen Cosby, listing the applicants and the successful applicants, did not further the scheme. In addition there is no allegation in the indictment showing any relation between F. Pen Cosby and any of the defendants, or to any of the actions alleged to have been taken by defendants or any alleged victim of the alleged scheme. The postcard to George Rowlas, from the Alcoholic Beverage Commission, announcing the date of the proposed hearing on his application if anything was in hindrance of the alleged scheme. Therefore it cannot be seen as bearing any real relationship to the scheme. The letters from the Alcoholic Beverage Commission to James Griffin, an applicant for a liquor permit, concerning Mr. Griffin's intention to lease certain property to Peter Gordon Dandridge is likewise insufficiently related to the crimes charged within the indictment. It is nowhere factually alleged in the indictment as to how or in what manner the communication concerning Griffin's "intention to lease certain property to Peter Gordon Dandridge" had any connection whatsoever with Dandridge's application for a permit. Moreover, if the mailing is construed to involve some question about the validity of a lease from Griffin to Dandridge, it was in hindrance of the scheme, rather than in furtherance of it.

Thus, from the face of the indictment this Court concludes that there is no real and proximate relationship or nexus between the mailings and the scheme alleged in the indictment. To hold otherwise would extend federal criminal jurisdiction far beyond the meaning of the Mail Fraud Act.

II. *The Scope of Section 1341.*

The Mail Fraud Act, 18 U. S. C. § 1341, is addressed to "scheme(s) or artifice(s) to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises. . . ." One of the questions presented by the motions under consideration is whether the acts charged in the indictment are such as to fall within the statutory proscription. The resolution of that question is dependent upon an analysis of the meaning and placement of the words "or for obtaining money or property . . ." in the statute.

The meaning of the phrase "or for obtaining money or property . . ." becomes crucial to the question of the sufficiency of the indictment because this Court has concluded that package liquor store permits are not money or property. According to the indictment, the object of the defendants' scheme or artifice was "to obtain from the Alcoholic Beverage Commission a number of newly available package liquor store permits." Inasmuch as such permits are clearly not "money," they must be considered to be "property" for the indictment to be sufficient unless the Court were to accept the argument advanced by the government that a scheme or artifice to defraud need not involve money or property in order to constitute an offense under 18 U. S. C. § 1341.

The government's theory that neither money nor property need be the object of a scheme or artifice to defraud under the Mail Fraud Act relies upon *United States* v. *States*, 488 F. 2d 761 (8th Cir. 1973). *States* held that a scheme or artifice under Section 1341 need not concern money or property. In so holding

the Eighth Circuit reasoned that the phrase "or for money or property . . ." in Section 1341 is to be viewed independently of the phrase "to defraud." 488 F. 2d at 764.

Contrary to the analysis in *States*, this Court believes that the addition of the phrase "or for obtaining money or property" to the Mail Fraud Act in 1909[4] was for the purpose of clarifying the statute. That is, the phrase in question was intended to be complementary or explanatory rather than independent. An analysis of the cases decided before and after the 1909 amendment to the Mail Fraud Act which added the phrase here in question leads to the conclusion that the purpose of the 1909 amendment was to clarify the preceding language and not to create a new offense. *E.g.*, *Streep* v. *United States*, 160 U. S. 128 (1895); *Durland* v. *United States*, 161 U. S. 306 (1896); *Hammerschmidt* v. *United States*, 265 U. S. 182 (1924); *Fasulo* v. *United States*, 272 U. S. 620 (1926). An examination of the legislative and case histories of statutes *in pari materia* with the Mail Fraud Act buttresses the conclusion that the 1909 amendatory language was complementary rather than supplementary in nature.[5]

The grammatical construction and the placement of the phrase in question in the statute also lead to the conclusion that the 1909 amendment did not alter the thrust of the Mail Fraud Act—to combat schemes which contemplate definable economic harm to the victims or targets of the scheme. *Regent Office Supply Co.* v. *United States*, 421 F. 2d 1174, 1182 (2d Cir. 1970). That the phrase in question was intended to be an appositional relation of thought clarifying the meaning of the preceding phrase is indicated by the use of the gerundive construction ("for obtaining") as opposed to the infinitive construction used in the preceding and succeeding phrases ("to

4. 35 Stat. 1130-31, Ch. 321, § 215.

5. Sections 149 and 300 of the "act to revise, consolidate, and amend the statutes relating to the Post Office Department," 17 Stat. 302, Ch. 335 and 17 Stat. 322-23, Ch. 335, are two such statutes.

defraud," "to sell"). *See*, 67 C. J. S. *Or* at 516 (noting that "or" can be used to introduce an alternative or to introduce a clarifier). The 1909 amendment was inserted into the statute between the language of original enactment of 1872 and the 1889 amendment[6] which clearly added a new offense which did not include "fraud" as an element. *Streep* v. *United States*, 160 U. S. 128 (1895). If Congress intended the 1909 amendment to establish an independent offense, it would appear to be more logical for Congress to have inserted the new offense after the 1889 amendatory language.

The government also argues that the sufficiency of the indictment is supported by the rationale of such cases as *United States* v. *Isaacs*, 493 F. 2d 1124 (7th Cir.), *cert. denied*, 417 U. S. 976 (1974); *United States* v. *Keane*, 522 F. 2d 534 (7th Cir. 1975); *United States* v. *Barrett*, 505 F. 2d 1091 (7th Cir. 1974); *United States* v. *Bush*, 522 F. 2d 641 (1975); *United States* v. *George*, 977 F. 2d 1091 (7th Cir. 1973), and *United States* v. *Bryza*, 522 F. 2d 414 (7th Cir. 1975). Each of those cases was based upon an employment relationship and a resultant breach of fiduciary duty. The first four of the above-noted cases involved public officials whose acts in some way deprived the public of the honest and faithful services of its officials; while the latter two cases involved corporate employees who, through their actions, deprived their employers of the honest and faithful services to which the employers were due. Such deprivations amount to the potential for definable economic harm which the statute contemplates, whereas here such potential does not exist. Furthermore, there is no allegation of corruption on the part of ABC or MCLB officials.

It has long been the law in Indiana that permits to sell liquor or the use or enjoyment thereof do not constitute "property." *McKinney* v. *Town of Salem*, 77 Ind. 213 (1881); *State ex rel. Zeller* v. *Montgomery Circuit Court*, 233 Ind. 563, 62 N. E. 2d 152 (1945); *Selle* v. *Short*, 326 N. E. 2d 610 (Ind. Ct.

6. 25 Stat. 873, Ch. 393.

App. 1975). A statute in effect at the time the events leading to the indictment allegedly took place provided:

> "No person shall be deemed to have any property right in any beer wholesaler's permit, beer retailer's permit, beer dealer's permit, liquor wholesaler's permit, liquor retailer's permit, liquor dealer's permit, wine wholesaler's permit, wine retailer's permit or wine dealer's permit, nor shall said permit itself or the enjoyment thereof be considered a property right." Ind. Code § 7-2-1-14(a) (Burns 1972).[7]

For the above-stated reasons the Court concludes that the permits here in question, the object of the alleged scheme, are not "money or property" within the contemplation of Section 1341. This conclusion, coupled with the Court's reading of the 1909 amendment to the Mail Fraud Act, causes the Court to rule that the scheme alleged is not one within the scope of the statute under which the indictment was brought. As the Court stated in its ruling from the bench on October 1, 1976, the acts charged here do "not come up to the level of criminality." For this reason the motions must be sustained and the indictment must be dismissed. Inasmuch as the substantive counts of the indictment (Counts I through XIV) are insufficient to charge an offense, the conspiracy count (Count XV) based on the substantive counts must also be dismissed.

This Court having considered the motions to dismiss the indictment and the briefs and oral arguments in support thereof and in opposition thereto, concludes that the motions should be sustained. The indictment must therefore be and hereby is DISMISSED.

IT IS SO ORDERED.

Dated this 27th day of October, 1976.

/s/ WILLIAM E. STECKLER
United States District Judge

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7. Title 7 of the Indiana Code was repealed by Acts 1973, Pub. L. No. 55 and replaced by a new Title 7.1. One part of Title 7.1 provides that a "permittee shall have no property right in a wholesaler's, retailer's, or dealer's permit of any type." Ind. Code § 7.1-3-1-2 (Burns Supp. 1976).

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 76-2068

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

CHARLES G. CASTOR, WILLIAM T. ROBINETTE, HENRY Y. DEIN AND JAMES A. JAMES,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. IP 76-79 CR - William E. Steckler, *Judge.*

Argued February 24, 1977—Decided July 8, 1977

Before CASTLE, *Senior Circuit Judge,* SPRECHER and BAUER, *Circuit Judges.*

BAUER, *Circuit Judge.* The Government appeals, pursuant to 18 U. S. C. § 3731, the district court's dismissal of a mail fraud indictment returned against the defendants. The issues for our decision are whether the indictment alleges a fraudulent scheme within the scope of the mail fraud statute, 18 U. S. C. § 1341, and whether the indictment alleges mailings in furtherance of the alleged scheme. We hold that the indictment charges both elements of the offense and reverse the dismissal.

I.

The indictment charges the defendant with fourteen substantive counts of mail fraud and one count of conspiracy to commit mail fraud in connection with a fraudulent scheme to procure a number of newly available permits to operate retail package liquor stores.

The details of the alleged scheme are as follows: In 1972 forty-five new package liquor store permits became available in Indianapolis, Indiana as a result of an Indiana Court of Appeals ruling that, in applying the statutory limit of one permit for each 5,000 persons or fraction thereof, the population of the Consolidated City of Indianapolis, which includes Indianapolis and several surrounding communities, rather than the population residing within the old city limits, controls the number of permits to be issued. *Indiana Alcoholic Beverage Commission* v. *Baker*, 153 Ind. App. 113, 286 N. E. 2d 174 (1972).

Approximately 120 applications were filed by persons seeking the new permits. The defendants are charged with fraudulently inducing the Indiana Alcoholic Beverage Commission (IABC) and the Marion County Local Board (MCLB) to issue permits to persons who did not intend to operate package liquor stores, and who, upon the issuance of the permits, transferred them to persons and entities of the defendants' choosing.

The indictment names twelve persons whom the defendants allegedly caused to sign and file with the IABC applications for permits, as well as other documents which concealed the defendants' interest in the applications.[1] Permits were issued to the twelve.

The indictment further states that, after the permits were issued, the defendants caused certain documents containing false

1. The applicants who allegedly acted in the defendants' interest were plaintiffs in the suit establishing the availability of the new permits, and, due to their participation in the litigation, were purportedly given preference in the granting of permits. Transcript of oral argument on motion to dismiss 73-74 (October 1, 1976).

representations to be filed with the IABC in order to receive permission to relocate nine of the approved stores. Included were sham leases and papers stating that the named applicants intended to operate liquor stores at the new premises.

The indictment goes on to allege that the defendants, using fraudulent methods and concealing their economic interest in the liquor store permits, induced the IABC to approve transfers of eleven of the permits to corporations under the defendants' control.

Finally, the indictment alleges that, after the transfer of the permits to the defendants' corporations, the defendants sought and received IABC approval to transfer the stock of the corporations to defendant James.

Each of the fourteen mail fraud counts sets forth a separate mailing that allegedly was in furtherance of the scheme. Count I charges a mailing from the IABC to George Rowles, one of the "fronts" who purportedly obtained permits for the defendants, notifying Rowles that the MCLB would hold a hearing on his application.

Counts II through VI charge the mailing of notices by the IABC to five of the "fronts" that the IABC had voted to issue them liquor permits.

Count VII charges the mailing by the IABC to F. Pen Cosby, an attorney retained by defendant Robinette to represent a number of applicants for package liquor store permits, of a list of persons whose permit applications were to be processed by the IABC and the MCLB.

Count VIII charges a later mailing by the IABC to Cosby of a list of persons who had been issued permits by the IABC.

Counts IX through XI, XIII, and XIV charge the mailing by the IABC of notices to five of the "fronts" that their applications were incomplete.

Count XII charges a mailing by the IABC to James Griffin regarding his intention to lease property to one of the "fronts."

The district court dismissed the indictment on the grounds (1) that it did not allege a scheme or artifice to defraud within the meaning of the mail fraud statute, and (2) that the mailings alleged to be in furtherance of the scheme were not sufficiently connected to the scheme to support federal criminal jurisdiction.

II.

Scheme or Artifice to Defraud

The district court found that the scheme alleged in the indictment did not satisfy the statutory requirement of being a "scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises". 18 U. S. C. § 1341.[2] The court construed the statute as requiring a fraudulent scheme to have as its object the "obtaining of money or property." It reasoned that the statutory phrase "or for obtaining of money or property by means of false or fraudulent pretenses, representations, or promises" modifies and limits the preceding phrase "any scheme or artifice to defraud", and thus does not describe an independent type of scheme cognizable as an offense.

Applying its construction, the district court found that, as a matter of law, the scheme charged in the indictment could

2. 18 U. S. C. § 1341 reads in full:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purposes of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

not constitute a scheme under the mail fraud statute because the liquor store permits that were the object of the alleged scheme are clearly not money and are not considered property under Indiana law.

The Government, arguing that the "or" between the two phrases in 18 U. S. C. § 1341 should be read in its ordinary disjunctive sense, contends that the district court's construction is erroneous. Under the Government's construction, the two phrases describe two different types of schemes that are cognizable under the mail fraud statute, the first proscribing schemes "to defraud" generally, and the second proscribing schemes "for obtaining of money or property by means of false . . . pretenses" particularly.

Alternatively, the Government contends that the fraudulent scheme charged in the indictment constituted an offense even under the district court's construction of the mail fraud statute because the permits obtained through the scheme constituted "property" within the meaning of the statute.

We need not consider the Government's alternative argument, for the district court's construction of 18 U. S. C. § 1341 has been previously rejected by this Court in *United States* v. *Isaacs*, 493 F. 2d 1124, 1149-50 (7th Cir.), *cert. denied*, 417 U. S. 976 (1974), and *United States* v. *Joyce*, 499 F. 2d 9, 22 (7th Cir.), *cert. denied*, 419 U. S. 1031 (1974). In both cases we held that the mail fraud statute is not limited to fraudulent schemes that contemplate the actual loss of money or property. Accord, *United States* v. *Brown*, 540 F. 2d 364, 374 (8th Cir. 1976); *United States* v. *States*, 488 F. 2d 761 (8th Cir. 1973), *cert. denied*, 417 U. S. 909 (1974).[3]

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3. The defendants, particularly Robinette, presented extensive arguments for their interpretation of the statute based upon previous versions of the statute and older cases, most of which were decided in the first quarter of this century. We find these arguments unpersuasive for the reasons stated by Judge Murray in *United States* v. *Mandel*, 415 F. Supp. 997, 1011-1012 (D. Md. 1976). In view of Judge Murray's comprehensive opinion repudiating the identical arguments presented to us, we feel it unnecessary to deal with the arguments here.

Moreover, this interpretation has been consistently followed by this Circuit in a line of cases holding that a scheme to defraud the government or a private party of an employee's honest and faithful services is proscribed by 18 U. S. C. § 1341. *United States* v. *Bush*, 522 F. 2d 641 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1484 (1976); *United States* v. *Keane*, 522 F. 2d 534 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1481 (1975); *United States* v. *Bryza*, 522 F. 2d 414 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 2237 (1976); *United States* v. *Barrett*, 505 F. 2d 1091 (7th Cir.), *cert. denied*, 421 U. S. 964 (1975); *United States* v. *George*, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973). Although the opinions in these cases do not concentrate on the language of 18 U. S. C. § 1341, the cases hold that a mail fraud violation can be asserted "even in the absence of an object susceptible to measurement in terms of money or property", *Bryza, supra* at 421.

The defendants attempt to distinguish the above cases by arguing that the mail fraud schemes in those cases caused or could have caused at least potential pecuniary loss to its victims and that no such loss could have occurred here. Defendants contend that, even absent a requirement that the scheme contemplate its victims *actually* lose money or property, there must be at least a *probability* of pecuniary injury to the individuals defrauded for the scheme to be cognizable under 18 U. S. C. § 1341. *United States* v. *Dixon*, 536 F. 2d 1388, 1399-1401 (2d Cir. 1976); *United States* v. *Regent Office Supply Co.*, 421 F. 2d 1174, 1182 (2d Cir. 1970).

We are not persuaded that the prior cases embody any such requirement. Nevertheless, we may assume arguendo that such a requirement exists, for we are convinced that, even if this Court's prior decisions contemplate that the alleged scheme have the probable or potential effect of causing its victims to lose money or property, the potential pecuniary loss resulting from the scheme alleged here is no different in kind from the potential effects attributable to schemes previously found cognizable under the statute.

In *United States* v. *Bush, supra* at 648, for example, in which we reserved the question of whether the mail fraud statute requires that the scheme's victims suffer some form of pecuniary injury, we found that the mere possibility of future pecuniary injury would be sufficient to meet any pecuniary injury requirement read into the statute. Bush, a City of Chicago official, hid his interest in an advertising firm and used his influence to persuade other officials to award contracts to the firm. In affirming his conviction, we stated that, had the City known of Bush's interest in the firm, "it might have been able to obtain a better contract." *Id.*

In the case at hand, the alleged scheme involves no more speculative pecuniary injury to its victims than the injury in *Bush*. The indictment charges that the defendants' scheme to garner several package liquor store permits through the use of "fronts" defrauded other persons who applied for the permits. The fraud diminished the other applicants' chances to obtain the new permits, both because the Indiana authorities were not likely to grant twelve permits to one individual, and because the defendants' "fronts" were purportedly given preference in the granting of the new permits because they were plaintiffs in the litigation that established the new permits' availability. This diminished opportunity to obtain permits reduced the other applicants' chances to make profits through the operation of package liquor stores or through the sale of liquor store permits,[4] and this type of potential pecuniary injury is, in our view, indistinguishable from the injury suffered by the City of Chicago in *Bush*—the diminished opportunity to obtain a financially favorable contract.

Moreover, the diminishment of the other applicants' opportunity to obtain permits alleged here is analogous to the injury suffered by the victims of the mail fraud scheme found to consti-

4. The permits apparently can be sold for prices exceeding $20,000, far above the cost of obtaining them. Transcript of oral argument on motion to dismiss 118 (October 1, 1976).

tute an offense in *Gregory* v. *United States*, 253 F. 2d 104 (5th Cir. 1958). In *Gregory*, a company sponsored a contest in which the contestants were to predict the winning team in each of twenty collegiate football games, the contest winner to receive a Cadillac automobile. The defendant won the contest by submitting predated entries after the games were played. The loss of opportunity suffered by the other contestants, the victims in *Gregory*, is almost identical to the loss suffered by the other applicants in the instant case.

Inasmuch as we find that the scheme charged in the indictment involves potential pecuniary injury to at least one category of victims, the other applicants for licenses, we need not, in reviewing the district court's dismissal of the indictment, consider the actual or potential harm to the other alleged victims, the IABC and the MCLB.

III.

Mailings

To support federal jurisdiction in a mail fraud prosecution, 18 U. S. C. § 1341 requires the use of the mails "for the purposes of executing [the] scheme or artifice [to defraud]."

The district court found, and the defendants argue to us, that the indictment failed to charge this element of the offense because it is not apparent on the face of the indictment that there is a sufficient nexus between the mailings and the alleged scheme.

We believe the district court asked the wrong question in considering this aspect of the indictment. The question is not whether the indictment particularly alleges sufficient facts from which a jury could find that the mailings charged were in furtherance of the scheme, but rather whether the Government conceivably could produce evidence at trial showing that the designated mailings were for the purposes of executing the scheme. *United States* v. *Sampson*, 371 U. S. 75, 76 (1962). The resolution of the question of whether the mailings alleged were in furtherance of the scheme must await trial

> "unless it so convincingly appears on the face of the indictment that as a matter of law there need be no necessity for such delay." *United States* v. *Feinberg*, 50 F. Supp. 976, 977 (E. D. N. Y. 1973), *aff'd*, 140 F. 2d 592 (2d Cir.), *cert. denied*, 322 U. S. 726 (1944).

The Government need not allege the subordinate evidentiary facts by which it intends to prove the "in furtherance" element of the crime charged, and an indictment, setting out the mailings charged and alleging that they were in furtherance of the scheme should not be dismissed as insufficient on its face unless there is no conceivable evidence that the Government could produce at trial to substantiate its "in furtherance" allegation.

Looking at the mailings charged in the indictment in light of the above standard, we hold that the district court erred in finding, at this stage of the proceedings, that the mailings were insufficient to support federal jurisdiction.

Causation

It is well settled that a defendant "causes" a mailing for purposes of 18 U. S. C. § 1341 either when he makes use of the mails or when he causes someone else to do so. In *Pereira* v. *United States*, 347 U. S. 1, 8-9 (1954), the Supreme Court held:

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."

Inasmuch as all the mailings charged in the indictment were letters from the Indiana Alcoholic Beverage Commission either notifying persons connected with the scheme of matters related to the granting of the permits or asking such persons for information regarding the permit applications, we cannot say as a matter of law that the mailing of such letters could not reasonably be foreseen by the defendants. Nothing in the indictment indicates that the charged mailings were not part of the normal processing of applications or were not sent in the ordinary course of the Commission's business.

In Furtherance of the Scheme

Having determined that the indictment sufficiently alleges that the defendants "caused" the charged mailings, we must determine whether the charged mailings could have been made in furtherance of the fraudulent scheme.

Under the statute, the mailings must be "for the purpose of executing the scheme." However, "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira* v. *United States, supra* at 8. Faced with these vague and somewhat ambiguous statements, we reviewed the relevant cases on the question in *United States* v. *Rauhoff*, 525 F. 2d 1170, 1176 (1975), and arrived at the following formulation:

> "Mailings are in furtherance of a scheme if they are incidental to an essential part of the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954). Under this definition, mailings made after the scheme has reached its fruition are not in furtherance of the scheme, *United States* v. *Maze*, 414 U.S. 395 (1974), nor are mailings which conflict with the purposes of the scheme and have little effect upon the scheme, *United States* v. *Staszcuk*, 502 F.2d 875 (7th Cir. 1974). On the other hand, mailings made to promote the scheme, *United States* v. *Joyce*, 499 F.2d 9 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974), or which relate to the acceptance of the proceeds of the scheme, *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), or which facilitate concealment of the scheme, *United States* v. *Sampson*, 371 U.S. 75 (1962) have been found to have been in furtherance of the scheme under this definition."

Further, we held in the more recent case of *Ohrynowicz* v. *United States*, 542 F. 2d 715 (7th Cir.), *cert. denied*, 97 S. Ct. 650 (1976), that a mailing which is a normal concomitant of a transaction that is essential to the fraudulent scheme can be in furtherance of the scheme.

In light of these precedents, we find that the mailings charged in the indictment could be found by a jury to be "for the purposes

of executing the fraudulent scheme" and thus can withstand a motion to dismiss the indictment.

The mailing in Count I is a notice of a hearing on a permit application sent to one of the "fronts" by the IABC. Defendants argue that, like the hearing notice found to be insufficiently connected with a mail fraud scheme in *United States* v. *Staszcuk*, 502 F. 2d 875, 880-881 (7th Cir. 1974), this mailing conflicted with the scheme, rather than promoted it, because it provided an opportunity for the public to scrutinize the "front's" permit application and thus might have led to revelation of the fraud. We find *Staszcuk* distinguishable since that decision followed a full trial of the mail fraud charges and was based on trial evidence that showed that concealment of the fraudulent scheme from the public was an essential aspect of the scheme charged in the case. In the case at hand, we cannot determine without a trial record whether a public hearing necessarily conflicted with the scheme or whether, as the Government may show at trial, the mailing of a hearing notice was a normal concomitant of the permit-granting process, see *Ohrynowicz, supra,* or whether the mailing was used to inform the defendants that the scheme was proceeding as planned.

The mailings charged in Counts II through VI, notices to the "fronts" that the IABC had voted to issue them permits, like the notice of hearing in Count I, could have been normal concomitants of the permit granting process or could have told the defendants that the scheme was proceeding as planned. Moreover, these mailings are very similar to the mailing in Count XIII in *United States* v. *Isaacs,* 493 F. 2d 1124, 1152 (7th Cir.), *cert. denied,* 417 U. S. 976 (1974). That mailing, a letter from the Illinois Racing Board to the defendants' corporation, informed the defendants that they had been granted racing dates. This indicated to the defendants that they had succeeded in their fraudulent scheme to obtain racing dates without disclosing their interest in the corporation. The mailing was held to be in furtherance of the scheme as a "necessary sequel to the concealment of the [defendants'] beneficial interest" in the corporation.

Counts VII and VIII charge two mailings from the IABC to F. Pen Cosby listing the applicants for the liquor permits and the persons who had been awarded permits. While the relationship of these mailings to the scheme is not entirely clear from the face of the indictment, the nature of the mailings is such that we cannot say as a matter of law that the Government could not produce evidence at trial to show that they were in furtherance of the scheme. Perhaps it was essential to the planning of the scheme that the defendants knew how many applicants there were and where their stores were to be located. This latter knowledge, in particular, could have been crucial in acquiring sites for the later transference of the locations of the permits, inasmuch as the Indiana authorities might have been reluctant to transfer the permits to sites that were close to those where other stores were scheduled to operate. This certainly constitutes a possible purpose of this mailing that could be shown at trial.

The mailings in Counts IX through XI, XIII and XIV were notices from the IABC to several of the "fronts" or their transferees that certain of their applications lacked essential information. These mailings could have aided the defendants by informing them that the scheme was proceeding as planned. They might even have been generated by deliberate omissions intended to cause the IABC to send the notices so the defendants could gauge the progress of the application process.

Finally, the letter in Count XII from the IABC to a lessor of property listed as the site at which one of the "fronts" wanted to operate his store could be in furtherance of the scheme. Like the letters to the "fronts" asking about missing items, this letter could have told the defendants that the scheme was going as planned or could have told them some particular fact about the permit-granting process. There is nothing in the indictment indicating that, as a matter of law, this letter could not have been in furtherance of the scheme.

As is clear from the foregoing discussion, we cannot say, from the face of the indictment, that no evidence could be

presented at trial to show that the charged mailings furthered the alleged fraudulent scheme.

In summary, we hold that the indictment charges a scheme or artifice to defraud within the meaning of 18 U. S. C. § 1341 and charges that the mails were used for the purpose of executing the charged scheme. Accordingly, we reverse the district court's dismissal of the indictment and remand the case for further proceedings.[5]

REVERSED AND REMANDED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

5. Circuit Rule 18 shall be applied by the district court on remand.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 8, 1977

Before

HON. LATHAM CASTLE, *Senior Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 76-2068 *vs.*

CHARLES G. CASTOR, HENRY Y. DEIN, WILLIAM T. ROBINETTE, AND JAMES A. JAMES,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 76-79-Cr

William E. Steckler, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED and REMANDED, in accordance with the opinion of this court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 9, 1977

Before

HON. LATHAM CASTLE, *Senior Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 76-2068 *vs.*

CHARLES G. CASTOR, WILLIAM T. ROBINETTE, HENRY Y. DEIN AND JAMES A. JAMES,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 76-79 CR

William E. Steckler, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause by the Appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

SUPREME COURT OF THE UNITED STATES

No. A-176

CHARLES G. CASTOR, ET AL., *Petitioners,*

v.

UNITED STATES

Order Extending Time To File Petition For Writ Of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 30, 1977.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 26th day of August, 1977.